No. 11757.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TIDE WATER ASSOCIATED OIL COMPANY, a corporation,

Appellant,

vs.

DAVID LAWTON RICHARDSON and BETHLEHEM STEEL COMPANY, a corporation,

Appellees.

BRIEF OF APPELLEE, DAVID LAWTON RICHARDSON.

GAINES HON,
IRVING FEINTECH,
315 West Ninth Street, Los Angeles 15,
Proctors for Appellee, David Lawton Richardson.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

Textbooks

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BRIEF OF APPELLEE, DAVID LAWTON RICHARDSON.

Introductory Statement.

The Appellee, David Lawton Richardson, was seriously injured while making a general routine inspection on the tanker, S. S. Frank G. Drum, which at the time of the accident was owned and operated by Appellant, Tide Water Associated Oil Company, a corporation. Said tanker was docked for general annual repairs and inspection at the shipyards of the Appellee, Bethlehem Steel Company, a corporation, which was located in the Los Angeles-Long Beach Naval Defensive Sea Area. Said area was governed by the rules set forth in Appellee's Exhibit 6 and such other rules as might be promulgated by the Captain of the Port.

At the time of the accident, Richardson was a member of the United States Coast Guard. He had received

orders from his commanding officer, to go aboard all vessels in Bethlehem Steel Shipyards and make a general routine inspection. The inspection included, among other things, looking for fire extinguishers, hoses, and taking a report from the mate at some time while Appellee Richardson was on the ship.

Prior to entering the gate at the Bethlehem Steel Company premises, Appellee Richardson showed his I.D. (identification) card to the guard on duty, signed the log and entered through said gate. He then went directly to the gangway of the said S. S. Frank G. Drum. There was a guard at the foot of the gangway, in a little house close by, who waved him aboard the said tanker. This gangway guard was an employee of Appellant Tide Water.

There was a portable electric light at the gangway, which was illuminated and was fastened to the side of the ship at the top of the gangplank. After boarding the ship Appellee Richardson looked in his immediate vicinity at the head of the gangway to see if anyone was on deck and, failing to see anyone, walked into the starboard passageway. He proceeded aft along the passageway to make a general inspection. The opening from the passageway onto the open deck amidship on both the starboard and port sides were covered by means of canvas flaps. The entire passageway was lighted but said lights did not reflect onto the deck of the ship. The deck was unlighted.

When Richardson reached the port side of the passageway he pushed back the canvas flap, stepped over the coaming of the port passageway with his left foot, turning to the right as he did so. Thereafter he brought his right foot over the coaming of the port passageway and when he attempted to set his right foot down to the right of the

port passageway, and immediately to the right of his left foot, it was over an open, unlighted and unguarded port bunker hatch and as a result Richardson was immediately precipitated to the bottom of the said port bunker tank, a distance of approximately 36 feet, receiving serious and permanent injuries. The accident happened between 9:00 and 9:30 o'clock P. M. Sunday night.

The said port bunker hatch opening was approximately 4 feet by 6 feet in size, and was approximately 36 feet in depth. This open and unguarded and unlighted hatch was immediately to the right of the port passageway. At the time Richardson fell into the said bunker hatch it was completely open and the steel hatch cover was raised and leaning back flush against the bulkhead. Said bunker hatch at the time of the accident was wholly unguarded and unlighted and was without any warning signs whatsoever.

The Chief Mate in charge of said tanker at the time of the accident was Adrian Rolland Frederick, who was an employee of Appellant, Tide Water, and who had knowledge that men, such as Richardson, who made inspections for the United States Coast Guard, would inspect the Frank G. Drum at different intervals. He testified as follows [Ap. pp. 475 and 476]:

> "Q. By Mr. Hon: Mr. Frederick, you knew, sir, as chief mate, that members of the United States Coast Guard would at different intervals inspect that ship, didn't you, sir? A. Yes; I did.
>
> Q. And you knew that they would inspect it night time as well as day time, didn't you? A. I did.
>
> Q. You knew that, in inspecting that ship, they were likely to go over any portion of the ship, isn't that right? A. I never followed them around. I

don't know where they went. I will tell you I knew they came aboard and they had a paper for me to sign and I signed the paper and I answered their questions specifically, and signed the paper as the chief officer of the ship.

Q. If you were not in sight, they would look for you until they found you? A. Yes, sir."

Chief Mate Frederick also had personal knowledge that the port bunker hatch was being left open, unguarded and unlighted every night when the Bethlehem shipyard crew left work. He testified under questioning by Appellant's own counsel as follows [Ap. pp. 467 and 468]:

"Q. By Mr. Gallagher: Mr. Frederick, did you have any personal knowledge, until after this accident happened, that the shipyard crew was leaving that port bunker hatch open every night when they left the job? A. I certainly did.

Q. When did you find it out? A. I saw it every morning when I came to work. The hatch was wide open.

Q. Was it ever roped off? A. No, sir. It was just as they left it in the afternoon.

Q. Was it ever lighted? A. No, sir. Just a second. One or two nights they did leave their working light on down in the bottom of that tank."

The accident happened between 9:00 and 9:30 o'clock on a Sunday evening. Chief Mate Frederick testified he knew that the lid to the bunker hatch was left open and the port bunker tank opening unguarded when the ship's crew quit work at 3:30 o'clock Saturday afternoon. Appellee directs the Court's attention to the fact that work was not again resumed until the following Monday morn-

ing, which was the day following the accident. Chief Mate Frederick testified as follows [Ap. p. 469]:

> "The Court: Did you see the shipyard crew leave after their day's work, the next morning at 3:00 o'clock? A. I did, sir.
>
> The Court: When was the last time they left the work? A. At 3:30 Saturday afternoon.
>
> The Court: And what was the condition of that opening at that time? Was the lid down or was it open or roped off or what? A. It was secured to the bulkhead, the forward bulkhead, of the fire room.
>
> Mr. Hon: Does that mean it was open?
>
> Mr. McHose: Yes; I take it—
>
> The Court: It was open? A. It was wide open.
>
> The Court: It was flush against the bulkhead? A. Flush against the bulkhead; yes, sir.
>
> The Court: Was it roped off in any way when they left the work? A. No, sir; it wasn't."

Answer of Appellee Richardson to Appellant's Specification of Assignments of Errors.

Appellee Richardson will confine his answers to specification of assignments of errors numbers 1 and 2. In as much as specification of assignments of errors numbers 3, 4 and 5 deal directly with the liability to Appellee Richardson as between Appellee Bethlehem Steel Company, a corporation, and Appellant Tide Water Associated Oil Company, a corporation, this Appellee Richardson is willing to submit these points to the Court on the record as it now stands without comment.

Apparently specification of assignment of error number 6 requires no argument since none was advanced in support of same by Appellant and appears to be nothing

more than a general statement on the part of Appellant. Appellee Richardson is willing to stand on the Findings of Fact and Conclusions of Law as signed by the Trial Court.

Answer to Specification of Assignments of Errors Numbers 1 and 2.

Specification of assignments of errors numbers 1 and 2 are so closely related that they can best be answered together.

Appellee Richardson contends that the answer to both of these specifications of assignments of error are fully covered in the "Answer of Libellant to Exceptions to Libel in Personam of Respondents Tide Water Associated Oil Company, a Corporation, and Bethlehem Steel Company, a Corporation," which is set forth in full on pages 29 to 36, inclusive, Volume I, Apostles on Appeal, a copy of which is set forth in Appendix A.

Libelant's answer to respondents' exceptions were filed by Appellee in answer to Appellant's Exceptions to Libel, which contained the same arguments now advanced by counsel for Appellant on Appeal, which exceptions were heard before the Hon. Charles C. Cavanah and overruled in their entirety. We contend that the "Answer of Libelant to Exceptions to Libel in Personam of Respondents Tide Water Associated Oil Company, a Corporation," as set forth in Appendix A, correctly states the law and fully answers Appellant's specification of assignments of error number 1 and 2, and no useful purpose would be served in attempting to further elaborate on the subject at this place.

We might add that the rule as to invitees and licensees is quite clearly set forth in 38 Am. Jur. 784 at paragraph 123 which is quoted at length in Appendix A. The cases there referred to show unequivocally that Appellee Richardson falls in the class of an invitee and shows that there is no merit to the contention of Appellant that Richardson was anything other than an invitee.

In this connection, however, we feel that it would be well, in answer to Appellant's contention to add the following: The testimony shows that the tanker was docked within the Los Angeles-Long Beach Naval Defense Area at the time of the accident. Further, that the tanker was subject to the rules and regulations, which had been promulgated as a wartime defensive measure of security, as well as for the benefit of owners and operators of ships and tankers. Ships and tankers coming into this naval defensive area were subject to such rules as might be promulgated by the Captain of the Port and such rules as contained in Appellee's Exhibit 6.

Appellant well knew that when they brought their ship into this naval defensive area for repairs that it was to be inspected by the United States Coast Guard and subject to the rules and regulations, as contained in Appellee's Exhibit 6, and such rules and regulations which were, or might be, promulgated by the Captain of the Port. In fact, the Chief Mate Frederick, an employee of Appellant, Tidewater, testified that he knew that a member of the United States Coast Guard would inspect the ship at different intervals and at said times take a report from him. [Ap. p. 475.]

Appellant has attempted to make an analogy between Appellee Richardson and a fireman or a policeman. It can be readily seen that no such analogy can exist in this case,

particularly for the following reasons, Firemen and policemen have generally been held not to be invitees for the reason that they come on in moments of emergency and unforeseen circumstances and their presence cannot be presumed to be anticipated by the owner of the premises. The distinction has been explained on the basis that firemen and policemen are likely to enter at unforeseeable times and places, and the possessor cannot be expected to have his premises constantly in readiness for them. However, in the case at bar, we have the testimony of members of Appellant's own crew, who were on duty at the time that the accident occurred, wherein said members specifically state that they knew that members of the United States Coast Guard would and did at different intervals make an inspection of the ship. [Ap. pp. 475 and 476.]

In answer to Appellant's statement that Appellee Richardson, was as a matter of law not an invitee because of the provisions of Title 14, U. S. C. A., Section 45, your Appellee, Richardson, has been unable to find anything in said paragraph which provides that a seaman first class making an inspection of the type Richardson was making is not an invitee as a matter of law. Counsel for Appellant well knows that said statute is one of inclusion and not exclusion. Further Richardson was acting upon orders of his commanding officer, Lieutenant Gregory, a commissioned officer, included under the section above referred to.

In answer to Appellant's contention that Appellee Richardson was aboard the vessel by authority of the United States Coast Guard and that, therefore Appellant had nc authority to exclude him from the vessel, it must be borne in mind that Appellant voluntarily took its ship to this

defensive naval area and submitted itself to the rules and regulations of the United States Coast Guard, which in itself was consent and invitation. In this respect, the cases referred to in Appendix A of this brief, dealing with grain inspectors and custom inspectors, are strictly analogous to the cases at bar and we contend these cases should be controlling in the case at bar. Appellant well knows that he cannot successfully contend that said inspections, as made by the Coast Guard, and the inspection being made by the Appellee at the time the accident occurred, were not for the benefit of Appellant. Clearly the general inspection, which consisted among other things, of inspecting fire extinguishers and also of determining if there was any sabotage [See testimony of Admiral Higbee, pp. 260 to 295, incl.] were for the benefit of Appellant Tide Water. If any damage occurred on said ship, arising from sabotage or lack of sufficient fire extinguishers, Appellant would suffer thereby.

Appellant has attempted to set forth at great length that at the time of the accident said tanker was docked for the specific purpose of undergoing repairs ordered by the War Shipping Administration.

William A. Harrington, employee of Bethlehem Steel Corporation, testified that the repairs in the port bunker tank were for the account of and contracted for by Appellant Tide Water and were paid for by Appellant Tide Water and were for the benefit of Appellant Tide Water and that although certain work was being done at the request of the War Shipping Administration not any of the work ordered to be done by the War Shipping Administration had anything to do with the work being done in the port bunker tank, which had been ordered by Appellant Tide Water. [Ap. pp. 326-362.]

Insofar as the cases cited by Appellant are concerned, it is apparent, upon the reading thereof, that the same do not have any bearing on the issues involved in this appeal and are clearly not in point. Appellee submits that any further discussion, concerning the same, is unwarranted.

Appellant refers to the fact that Richardson had been receiving a pension of $41.00 per month from the United States Government. The Court's attention is called to the fact that the Trial Court had this evidence before it at the time of making its decision and all issues with respect to the effect of such a pension, if any, were doubtlessly considered by the Trial Court in arriving at its award.

In answer to Appellant's contention that Appellee was guilty of contributory negligence, Appellee Richardson contends that the evidence in this respect speaks for itself; there was an open, unguarded, unlighted hatch of the approximate dimensions of 4 feet by 6 feet—and approximately 36 feet deep; that Appellant by its own testimony admitted that it knew that this dangerous condition existed at the very time of the accident and further knew that the ship would be inspected by a member of the United States Coast Guard; that a member of the Coast Guard would likely go over the entire ship in making such inspection. Richardson's actions were those of any normal person; to-wit, he stepped one foot over the coaming leading from the passageway to the unlighted deck and intended to turn right and in bringing the right foot over the coaming of the passageway propelled his right foot to the right within the normal range of a step and was immediately precipitated a distance of 36 feet to the bottom of this open, unguarded, unlighted hatch.

The Court, in order to determine the conditions for itself inspected the place of the accident and personally went

aboard the S. S. Frank G. Drum and *inspected* the hatch in question and the surrounding circumstances and after making such an inspection rightfully held that Richardson was not guilty of contributory negligence. In this respect we call the Court's attention to page 112 of O'Brien's Manual of Federal Appellate Procedure, Third Edition, which states as follows:

> "Conclusions to be drawn from the evidence in an admiralty case are primarily for the trial judge, where the trial judge saw the witnesses, heard their testimony, and had an opportunity of passing upon their credibility and accuracy, the Appellate Court will not interfere with his findings of fact and conclusions of law, unless the record discloses some plain error of fact, or unless there *is a misapplication of some rule of law.*"
>
> *Lortie v. American Hawaiian S. S. Co.* (C. C. A. 9), 78 F. (2d) 819;
>
> *The Corapeake* (C. C. A. 4), 55 F. (2d) 228.

In conclusion, Appellee Richardson contends that the Judgment should be affirmed in favor of this Appellee.

Respectfully submitted,

GAINES HON,
IRVING FEINTECH,
Attorneys for Appellee.

APPENDIX A.

[Title of District Court and Cause]

ANSWER OF LIBELLANT TO EXCEPTIONS TO LIBEL IN PERSONAM OF RESPONDENTS, TIDE WATER ASSOCIATED OIL COMPANY, A CORPORATION, AND BETHLEHEM STEEL CORPORATION, A CORPORATION

I.

Insofar as Respondents' argument concerning fictitious defendants is concerned, Libellant feels that they are sufficiently described in the Libel and sufficiency identified and submits that point for the consideration of the Court without further argument.

II.

Insofar as the allegations of negligence are concerned, the Court's attention is respectfully called to pages 4, 5, and 6 of the Libel, and particularly to page 5 where seven specific acts of negligence are set forth in detail. In this respect Libellant desires to call the Court's attention to the case of Jolivel vs. City of Seattle, D. C. Wash. 1915, 226 F. 963 which holds that a Libel alleging with reasonable certainty the essential facts showing a legal duty, a default therein, and a resultant injury of which it is the proximate cause is sufficient. [28]

In fact the cases have gone so far as to hold that there is no rigid rule which prevents Libellant alleging one fault recovering on proof of a different fault. Libellant may rely upon improper speed in fog shown by defendant's evidence, although he alleged only improper steering. The Cambridge, D. C. Mass. 1871, Fed. case No. 2334. Complaint was made of the fact that Libellant in his Libel

stated "There is negligence in other respects as will be shown upon the trial." The Court is well aware of the rule that a Libellant may amend to conform to proof and this allegation was placed in the Libel to preserve his rights in the event it became necessary to amend the Libel at the time of trial to conform to proof.

Libellant contends that the Respondents have been specifically and fully informed of the acts of negligence and that the Libel is sufficient in this respect.

III.

Apparently the main basis of the exceptions of both Respondents is the contention that Libellant was a licensee and not an invitee. In support of their contention in this respect, they quoted at length from Corpus Juris and cite ~~the said~~ cases involving policemen and firemen who had responded to an emergency call and accordingly were held to be mere licensees. Such is not the situation in the case at bar. In fact some jurisdictions have held that firemen are invitees. In this respect the Court's attention is called to 38 Am. Jur. page 785, paragraph 125 which states in part as follows:

> "According to some authority, an owner of property is under obligation to make his premises reasonably safe for a fireman coming thereon in the discharge of his duty, and can be held liable for an injury sustained by a fireman as a result of some defect in the premises which could have been remedied in the exercise of reasonable [29] care . . ." Meiers v. Fred Koch Brewery, 229 NY 10, 127 NE 491, 13 ALR 633.

Other jurisdictions hold that policemen and firemen coming on premises in line of their duties as such act in

an emergency and therefore are mere licensees and not invitees. The question of whether one acted in an emergency or not seems to be the distinguishing factor where they hold policemen and firemen are licensees.

The rule seems to be set forth quite clearly in 38 Am. Jur. page 784 at paragraph 123:

> "Sec. 123. Public Officers—The decisions appear to be somewhat indefinite with respect to the status of public officers who enter upon premises in the discharge of duties imposed upon them by law. Some cases seem to warrant the statement that they are to be deemed, so far as the liability of the owner or occupant for negligence is concerned, not trespassers or licensees, but persons rightfully on the property. On the other hand, it has been asserted that at common law the occupier of premises is not under a duty of active diligence to protect from harm a person who enters on the premises under a license given by the law. It seems probable that no very general principle can be formulated, the cases being governed largely by their facts and surroundings. A distinction suggests itself, however, between officers who go upon property in the regular course of the business conducted thereon, whose presence may be deemed to be contemplated and known to the owner or occupant, and those public officers who enter not under any prearranged scheme, but as the result of extraordinary and unforeseen circumstances. Officials [30] of the former class may be deemed to come on the premises by invitation, whereas those of the latter description properly may be considered no more than licensees. At any rate, officers performing prescribed and regular duties which require them to visit premises at regular intervals, such as engineers and in-

spectors, have been held to enjoy the status of persons entering by invitation." . . .

In this respect the Court's attention is called to Article Tenth, page 4 of the Libel, and particularly the last portion thereof, and also Article Twelfth, page 5, paragraph (g) thereof.

There are numerous cases involving this very point in California. The case of Wilson vs. Union Iron Works, 167 Cal. 539 was a case where a United States Inspector of Customs on the morning of the accident had a duty to board the steamer "Mongolia" at Pier 44 and stay on board the ship until it reached defendant's drydock. When the gangplank was made fast it was his further duty to go down first and allow no one to precede him so that other custom officers who were waiting for his arrival at the foot of the plank could go aboard the ship and immediately search the passengers for dutiable articles before anyone left the ship. While descending the plank it broke due to a defect. Under this set of facts the defendant claimed that plaintiff was merely a licensee at most and owed him only that duty which was owing to a licensee.

The Court held "Under these circumstances it is clear that the defendant owed to all persons lawfully and properly on board such vessel on arrival at the dock and there wishing to leave it, the duty of providing a safe and sound gangplank for their use."

. . . . . .

"It was, at all events, bound to exercise reasonable and ordinary care for the safe carriage of those whom it had reason [31] to expect would avail themselves of that means of leaving the vessel."

"The plaintiff stood in a relation to the defendant which made this duty owing to him. He was aboard the vessel and left it over this gangplank in the performance of his duty, a duty which was usually performed by custom house officers in such cases and of which it is to be inferred the defendant had notice."

In the case of "The City of Naples," Gilchrist et al vs. Naples, 69 Fed. Rep. 794, the Libellant was a grain inspector and while in discharge of his official duty of inspecting the vessel preparatory to shipping a cargo of grain, he fell down a dark and unguarded hatchway. He testified he was following the direction pointed out to him by the captain; he testified that the lower deck was lighted only by two candles which were at a considerable distance from the hatchway into which he fell and which was invisible in the dark. The Court held "The Libellant was not on the vessel as a mere licensee. He was there in the discharge of an official duty in which the vessel itself had an interest for it could not receive its cargo until it had been inspected. The right and duty of the Libellant to inspect the vessel did not authorize him to take command of her or to give orders to her crew to prepare her for inspection or to light up the vessel for that purpose."

The case of Law vs. Grand Trunk Ry. Co., 72 Maine 313, held that the owner of a wharf where foreign laden vessel discharge, are liable to custom officers who are required to visit the premises in the performance of their duties for personal injuries received while in the exercise of due care because of the unsafe or unsuitable condition of the wharf. It further held that a custom officer whose duty is to watch for smugglers and prevent smuggling

may be in the exercise of due care when in the course of his duty he passes over a wharf where a foreign laden vessel is lying in the night time and without a lantern.

In the case of Tobin vs. P. S. & P. R. Co., 59 Maine 183, it [32] was held that a railway corporation is liable to a hackman for an injury received while carrying a passenger to their depot for transportation, by stepping, without fault, into a cavity in their platform, and occasioned solely by the want of ordinary care on the part of the corporation in leaving their platform in an unsafe condition.

The Court's attention is specifically called to the case of Christy v. Ulrich et al, 113 Cal. App. 138; 298 Pac. Rep. page 135. This was a case where the plaintiff was acting under the employment of the State of California as a resident engineer in charge of the construction of a state highway bridge. The bridge was being constructed under contract by the defendant, Ulrich. The duties of the plaintiff were to inspect the work under construction. Plaintiff was watching the progress of the workmen in pouring and tamping concrete. The tamper happened to break and one of the workmen said there was another tamper on a cross-runway at "Bent 2."

Plaintiff volunteered to get this tamper for the workmen. He walked along the main runway to the cross-runway at "bent 2," picked up the tamper and returned to the main runway, where one of the planks upon which he stepped gave way and precipitated him into the creek bed causing the injuries complained of.

The defendants insisted the plaintiff was a mere licensee to whom they owed no duty except to abstain from willful and wanton negligence. In this respect the Court stated as follows:

> "The respondent was not a mere licensee. The work was being performed upon a public highway right of way; the respondent was a state employee assigned to the highway division of the state department of public works; his duties, at the time of the accident, were to inspect the work under construction; and, for this purpose, it was necessary for him to go upon the scaffolding and other portions of the work as it progressed. Immediately preceding [33] the accident, he was inspecting the pouring of concrete in "Bent No. 3." He saw that the tamper was broken and that the tamping of the concrete was not being done properly. He volunteered to get the workmen another tamper, and was injured while returning with that implement. In this he may have been acting outside the scope of his employment, but it must be remembered that he is not suing his employer in this action for injuries caused during the course of employment. He is resting his case on the negligence of the contractor. It is conceded that it was his duty to inspect all portions of the work, and the fact that he was voluntarily carrying a tool to the workmen while passing over the main runway does not alter his status as an invitee."

The Court further stated "He was not on that runway upon any private business of his own or from mere curiosity or in violation of orders of inspections. He was there because his duties required him to be there. The fact that at the moment of the accident he was carrying a tool to

the workmen does not change the status because this was in aid of the duties he had to perform."

Certainly the foregoing cases are analogous to the case at bar and they show conclusively that Libellant at the time of his accident was not a mere licensee but was an invitee and as such the respondent owed him at least ordinary care.

One of the contentions Respondent raises in its exceptions is the effect of Executive Order No. 9054, 7 Fed. Reg. 837 as amended by Executive Order No. 9244, 7 Fed. Reg. 7327. Certainly if there is anything to Respondent's point in this connection, it would at most be a special defense to be pleaded in its answer and not be raised by way of exceptions. In fact the evidence in this case will show that at the time of the accident, to-wit: August 6, 1944, Tide Water Associated Oil Company, a corporation, was the owner and operator of [34] the said vessel "SS Frank G. Drum" and that the War Shipping Administration did not take over the operations of said vessel until sometime subsequent to the happening of the accident.

Wherefore Libellant prays that the exceptions of both Respondents be disallowed and that they be directed to answer Libellant's Libel forthwith.

Respectfully submitted,

GAINES HON, and
IRVING FEINTECH,
By GAINES HON,
Proctors for Libellant [35]